Pacific & Orient Insurance Co Sdn Bhd v Chong Wing Fah & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02–820 OF 2000
ZALEHA ZAHARI, RAUS SHARIF AND ABU SAMAH NORDIN JJCA
24 JULY 2008

Civil Procedure — Summary judgment — Triable issues — Whether plain and obvious case for summary judgment

Tort — Road accident — Damages — Civil suit against insurer to recover assessed damages arising out of road accident — Insurer denying policy of insurance covered injured victims — Not established whether negligent driver an authorised driver of the insured — Whether civil recovery suit a plain and obvious case for summary judgment

The plaintiffs and/or their loved ones were traveling in a van driven by one Lum when they were injured and/or killed in a road accident. They obtained judgment and damages against Lum in the Kuala Lumpur High Court ('the first suit'). Lum failed to satisfy the judgment sum. The plaintiffs then filed a civil suit for recovery of the judgment sum ('the second suit') against the defendant, as the van driven by Lum was insured with the defendant. The plaintiffs then applied for and obtained from the senior assistant registrar a summary judgment against the defendant. The defendant appealed to the judge in chambers against that decision who dismissed the appeal with costs. The defendant thus appealed to the Court of Appeal. The defendant argued on appeal that this was not a proper case for summary judgment since: (i) its policy did not cover liability for any death or bodily injury to any person other than a person 'carried by reason of or in pursuance of a contract of employment'; (ii) the plaintiffs and/or their loved ones were not travelling in the van pursuant to a contract of employment but rather as passengers — this was in law a triable issue that could only be determined during a trial; and (iii) the principle in *Richards v Cox* [1943] 1 KB 139 did not apply to the facts in the instant case.

Held, allowing the appeal with costs:

(1) This was not a plain and obvious case for summary judgment to be

entered against the defendant. In the first suit, the plaintiffs merely pleaded that they and/or their loved ones were authorise as 'passengers' in the van. The defendant was thus entitled to elect, which it did, not to conduct its defence because by virtue of the insurance policy, the defendant would not be liable. The defendant would only be liable if it could be shown that the plaintiffs and/or their loved ones were authorise in the said van 'by reason of or in pursuance of contract of employment' (see para 13).

(2) It was only in the second suit that the plaintiffs chose to state that they and/or their loved ones were passengers in the van 'by reason of or in pursuance of a contract of employment'. The defendant had filed its defence challenging this fact and the issue was a triable issue which could only be determined during trial. In no circumstances could summary judgment be entered when such facts were in dispute (see para 14).

(3) The principles of *Richards v Cox* as applied by the local cases, were not applicable to the present case. In the present case, it was not established or agreed between the parties that Lum was the authorised driver of the insured. Thus, whether Lum was the authorised driver of the insured remained a disputed fact which needed to be determined at a trial (see para 15).

[Bahasa Malaysia summary

Plaintif-plaintif dan/atau orang yang disayangi dalam perjalanan menaiki van yang dipandu oleh Lum apabila mereka tercedera dan/atau terbunuh dalam kemalangan jalan raya. Mereka telah memperoleh penghakiman dan ganti rugi terhadap Lum di Mahkamah Tinggi Kuala Lumpur ('guaman pertama'). Lum telah gagal untuk memenuhi jumlah penghakiman. Plaintif-plaintif kemudian telah memfailkan guaman sivil untuk mendapat semula jumlah penghakim ('guaman kedua') terhadap defendan, kerana van yang dipandu oleh Lum diinsuranskan dengan defendan. Plaintif-plaintif kemudian memohon untuk dan memperoleh daripada penolong kanan pendaftar penghakiman terus terhadap defendan. Defendan telah merayu kepada hakim dalam kamar terhadap keputusan tersebut yang telah menolak rayuan dengan kos. Defendan oleh itu telah merayu ke Mahkamah Rayuan. Defendan berhujah dalam rayuan bahawa ini bukan kes wajar untuk penghakiman terus kerana: (i) polisinya tidak meliputi liabiliti untuk sebarang kematian atau kecederaan badan kepada orang lain selain mereka yang 'carried by reason of or in pursuance of a contract of employment'; (ii) plaintif-plaintif dan/atau orang yang disayangi tidak bersama dalam van itu menurut kontrak pekerjaan tetapi hanya sebagai penumpang — ini dari segi undang-undang merupakan isu yang perlu dibicarakan yang hanya boleh

ditentukan semasa perbicaraan; dan (iii) prinsip dalam *Richards v Cox* [1943] 1 KB 139 tidak terpakai kepada fakta dalam kes ini. A

Diputuskan, membenarkan rayuan dengan kos: B

(1) Ini bukan kes yang biasa dan nyata untuk penghakiman terus dimasukkan terhadap defendan. Dalam guaman pertama, plaintif-plaintif hanya memplidkan bahawa mereka dan/atau orang yang disayangi telah diberi kuasa sebagai 'passengers' dalam van itu. Defendan oleh itu berhak untuk memilih, seperti yang dilakukannya, C untuk tidak melakukan pembelaannya kerana menurut polisi insurans, defendan tidak bertanggungjawab. Defendan hanya bertanggungjawab jika ia boleh dibuktikan bahawa plaintif-plaintif dan/atau orang yang disayangi diberi kuasa ke atas van itu 'by reason of or in pursuance of contract of employment' (lihat perenggan 13). D

(2) Hanya dalam guaman kedua, plaintif-plaintif memilih untuk menyatakan bahawa mereka dan/atau orang yang disayangi merupakan penumpang-penumpang dalam van itu 'by reason of or in pursuance of a contract of employment'. Defendan telah memfailkan pembelaannya E mencabar fakta ini dan isu tersebut merupakan isu yang perlu dibicarakan yang hanya boleh ditentukan semasa perbicaraan. Penghakiman terus tidak boleh sama sekali dimasuki apabila fakta sebegini dipertikaikan (lihat perenggan 14).

(3) Prinsip-prinsip di dalam kes *Richards v Cox* seperti yang digunakan oleh F kes-kes tempatan, tidak terpakai dalam kes ini. Dalam kes ini, ia tidak dibuktikan atau dipersetujui antara pihak-pihak bahawa Lum merupakan pemandu yang diberi kuasa oleh pengambil insurans. Oleh itu, sama ada Lum adalah pemandu yang diberi kuasa oleh pengambil insurans masih merupakan fakta yang dipertikaikan yang perlu G ditentukan semasa perbicaraan (lihat perenggan 15).]

Notes

For cases on damages for road accident generally, see 12 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1664–1665. H

For cases on triable issues, see 2(3) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 7442–7540.

Cases referred to

Alloy Automotive Sdn Bhd v Perusahaan Ironfield Sdn Bhd [1986] 1 MLJ 382 (refd) I

Chan Kum Fook & Ors v The Welfare Insurance Co Ltd [1975] 2 MLJ 184 (refd)

China Insurance Co Ltd v Teh Lain Lee & Anor [1977] 1 MLJ 1 (refd)

Lim Eng Yew v United Oriental Assurance Sdn Bhd [1989] 1 MLJ 454 (refd)
Malaysia Insurance (M) Sdn Bhd v Asia Hotel Sdn Bhd [1987] 2 MLJ 183 (refd)
Richards v Cox [1943] 1 KB 139 (not folld)
Union Insurance Malaysia Sdn Bhd v Chan You Yong [1999] 2 AMR 1473 (refd)
United Oriental Assurance Sdn Bhd v Lim Eng Yew [1991] 3 MLJ 429 (refd)

Legislation referred to

Road Transport Act 1987 s 96, 96(1), 96(2)
Rules of the High Court 1980 O 14

Appeal from: Civil Suit No D1–22–596 of 1991 (High Court, Kuala Lumpur)

Jagjit Singh (Jagjit Singh & Co) for the appellant.
Tony Dhana (Tony Dhana & Co) for the respondent.

Raus Sharif JCA (delivering judgment of the court):

[1] This is an appeal by the defendant against the decision of the High Court at Kuala Lumpur, given on 11 September 1997. The High Court had dismissed the defendant's appeal to the judge in chambers in respect of a summary judgment under O 14 of the Rules of the High Court 1980 ('O 14 application'), obtained by the plaintiffs before the senior assistant registrar.

[2] We heard and allowed the appeal on 13 May 2008. We now give our reasons.

[3] The relevant facts and events leading to this appeal is this. On 1 January 1989, Chong Kek Kong, Yap Siew Wai, Cheah Kok Wah and Liew Pooi Liang were travelling in Motor Van No BCA 2482 ('the said van') driven by Lum Weng Hong, when the said van was involved in a road traffic accident with a motor lorry No JBF 9575. Chong Kek Kong and Yap Siew Wai were killed while Cheah Kok Wah and Liew Pooi Liang were seriously injured.

[4] On 7 November 1989, the father of Chong Kek Kong ('first plaintiff'), the father of Yap Siew Wai ('second plaintiff') together with Cheah Kok Wah, an infant suing by his father and next friend ('third plaintiff') and Liew Pooi Liang ('fourth plaintiff') had filed a claim for damages vide Civil Suit No S6–23–105 of 1989 ('first suit') in the Kuala Lumpur High Court against the driver of the said van, Lum Weng Hong.

[5] On 22 November 1989, the plaintiffs entered interlocutory judgment against Lum Weng Hong. Subsequently, on 27 August 1990, the damages were assessed by the Senior Assistant Registrar of the High Court as follows:

(a) The first plaintiff

(i)	General damages	RM 48,400.00	
(ii)	Interest thereon at 8% per annum from the date of filing (7.11.89) to the date of judgment (27.8.90)	RM 3,108.20	
(iii)	Special damages	RM 6,689.70	
(iv)	Interest at 4% per annum from date of accident to the date of judgment	RM 442.05	RM58,639.95

(b) The second plaintiff

(i)	General damages	RM 57,600.00	
(ii)	Interest thereon at 8% per annum from date of filing (7.11.89) to date of judgment	RM 3,699.00	
(iii)	Special damages	RM 4,228.80	
(iv)	Interest at 4% per annum from date of accident to date of judgment	RM 279.45	RM 65,807.25

(c) The third plaintiff

(i)	General damages	RM 40,316.00	
ii)	Interest thereon at 8% per annum from date of filing to date of judgment	RM 2,589.05	
(iii)	Special damages	RM 8,355.40	
(iv)	Interest at 4% per annum from date of accident to date of judgment	RM 552.15	RM 51,812.60

(d) The fourth plaintiff

(i)	General damages	RM 10,000.00	
(ii)	Interest thereon at the rate of 8% per annum from date of filing to date of judgment	RM 642.20	
(iii)	Special damages	RM 2,460.10	
(iv)	Interest at the rate of 4% per annum from date of accident to date of judgment	RM 162.55	RM 13,264.85

(e)

Taxed costs	RM 5,265.00	
	RM194,789.65	

Lum Weng Hong failed to satisfy the judgment sum. The plaintiffs then filed Kuala Lumpur High Court Civil Suit No D1–22–596 of 1991 for recovery of the judgment sum ('second suit') against the defendant, as the said van was insured with the defendant. On 15 June 1991, the plaintiffs filed an O 14 application against the defendant. They succeeded before the senior assistant registrar. Being aggrieved, the defendant appealed to the judge in chambers against that decision. On 6 November 1991 the learned judge dismissed the appeal with costs. Hence this appeal.

[6] Before us, the main issue is whether this is a fit and proper case for a summary judgment be entered against the defendant on the second suit.

[7] The plaintiffs advanced the following arguments:

8.1 Chong Kek Kong, Yap Siew Wai, the third and fourth plaintiffs were sales representative of one Ong Sau Meng, trading as Totoways Enterprise. On the fateful day they were conveyed in the said van to do sales. The said van belonged to Totoways Enterprise and was driven by Lum Weng Hong, another employee of Totoways Enterprise. Since the said van was insured with the defendant, the defendant is obliged to settle the judgment sum in the first suit by virtue of s 96(1) of the Road Transport Act 1987 ('the Act').

8.2 Prior to commencing the first suit against Lum Weng Hong, the plaintiffs' solicitors gave notice, pursuant to s 96(2) of the Act to the defendant on 15 September 1989 of their client's intention to

commence legal proceedings against Lum Weng Hong and advised them to appoint solicitors. However, the defendant did not do anything until the second suit was filed against them. Hence, the defendant is estopped from trying to raise issues in the second suit which they could have raised in the first suit against Lum Weng Hong. Therefore, the defendant has no defence to the second suit and the summary judgment was rightfully entered against the defendant.

8.3 Even assuming Chong Kek Kong, Yap Siew Wai, the third and fourth plaintiffs were not conveyed in the said van by reason of or in pursuance of a contract of employment, the defendant would still be liable under cl 2 of s 11 of the insurance policy which was fully considered and given legal effect by the celebrated case of *Richards v Cox* [1943] 1 KB 139 and was applied in the following local cases, namely *Lim Eng Yew v United Oriental Assurance Sdn Bhd* [1989] 1 MLJ 454; *Chan Kum Fook & Ors v The Welfare Insurance Co Ltd* [1975] 2 MLJ 184; *China Insurance Co Ltd v Teh Lain Lee & Anor* [1977] 1 MLJ 1; *United Oriental Assurance Sdn Bhd v Lim Eng Yew* [1991] 3 MLJ 429; and *Union Insurance Malaysia Sdn Bhd v Chan You Young* [1999] 2 AMR 1473.

[8] The defendant put forth the following arguments:

9.1 By endorsement 100 of the insurance policy of the said van, the policy does not cover liability for any death or bodily injury to any person other than a person carried by reason of or in pursuance of a contract of employment.

9.2 That Chong Kek Kong, Yap Siew Wai, the third and fourth plaintiffs were travelling as passengers in the said van not as 'passengers by reason of in pursuance of a contract of employment'. They were travelling in the said van as mere passengers. Thus, the issue whether they were travelling in the said van merely as 'passengers' or as 'passengers by reason of or in pursuance of a contract of employment' is in law a triable issue and can only be determined during a trial.

9.3 The principle in *Richards v Cox* has no application and can be distinguished from the issues in dispute.

[9] The High Court in its decision dated 16 March 2002, basically held that since judgment was entered against Lum Weng Hong in the first suit, it is not open to the defendant in the second suit to attempt to avoid liability as to do so would be contrary to the provisions of s 96(1) of the Act. According to the learned judge, as the defendant had chosen to sit back and do nothing in the first suit and has elected not to avail itself of the defence it could raise at the time it had notice of the first suit, it was estopped by law

and equity from doing so in the second suit. The summary judgment was therefore rightly entered against the defendant.

[10] The principles to be applied in a summary judgment proceeding is well illustrated in the case of *Alloy Automotive Sdn Bhd v Perusahaan Ironfield Sdn Bhd* [1986] 1 MLJ 382, where the Supreme Court had stated that (at p 390):

> Where all the issues are clear, summary judgment should be given. An appellant ought not to be shut out from defending unless it is very clear that he has no cause in the action. A complete defence need not be shown. The defence set up need only show that there is a triable issue or question or that for some reason there ought to be a trial.

[11] Similar principles were further illustrated in another Supreme Court case of *Malaysia Insurance (M) Sdn Bhd v Asia Hotel Sdn Bhd* [1987] 2 MLJ 183 where it was held that (at p 184):

> The underlying philosophy in the O 14 provision is to prevent a plaintiff clearly entitled to the money from being delayed his judgment where there is no fairly arguable defence to the claim. The provision should only be applied to cases where there is no reasonable doubt that the plaintiff is entitled to judgment. Order 14 is not intended to shut out a defendant. This jurisdiction should only be exercised in very clear cases.

[12] On the facts of this case we are unable to hold that this is a plain and obvious case for a summary judgment be entered against the defendant. We hold the view that the defendant was not estopped by law and equity in resisting the second suit. This is because the first suit and the second suit are two distinct actions. In the first suit the plaintiffs in their statement of claims merely state that Chong Kek Kong, Yap Siew Wai, the third and fourth plaintiffs were travelling as 'passengers' in the said van. The defendant was thus entitled to elect, which it did, not to conduct its defence because by virtue of endorsement 100 of the insurance policy, the defendant would not be liable. By endorsement 100 the defendant would only be liable if it can be shown that Chong Kek Kong, Yap Siew Wai, the third and fourth plaintiffs were travelling in the said van 'by reason of or in pursuance of contract of employment'.

[13] It is only in the second suit that the plaintiffs chose to state that Chong Kek Kong, Yap Siew Wai, the third and fourth plaintiffs were passengers in the said van 'by reason of or in pursuance of a contract of employment' with their employer Ong Sau Meng trading as Totoways Enterprise. The defendant had filed its defence challenging this fact. Hence, the issue whether Chong Kek Kong, Yap Siew Wai, the third and fourth

plaintiffs were travelling in the said van, merely as 'passengers' or as 'passengers by reason of or in pursuance of a contract of employment' in our view was a triable issue which can only be determined during trial. In no circumstances a summary judgment may be entered when such facts are being disputed.

[14] We are also of the view that the principles of *Richards v Cox* which were applied by the local cases, is not applicable to the present case. What happened in *Richards v Cox* is this. The plaintiff was involved in an accident while being carried as a passenger in her employer's van driven by another employee, Robson, who was an authorised driver of the insured namely, Dickerson Brothers. The relevant policy denied liability to persons injured in the course of employment with the insured. However, the court held that the policy still covered the plaintiff in respect of her claim against the authorised driver who was not her employer, and the authorised driver, in turn, could claim to be indemnified by the insured against any damages which the plaintiff might recover from him. Clearly in *Richards v Cox*, it was established that Robson was the authorised driver of the insured. But in our case, it is not established that Lum Heng Hong was the authorised driver of the insured.

[15] Similarly in all of the local cases submitted by learned counsel by the plaintiffs, which applied the principles of *Richards v Cox*, certain facts were established or agreed between the parties. For example, in *Union Insurance Malaysia Sdn Bhd v Chan You Yong* [1999] 2 AMR 1473, the issue whether the driver of the motorcar was the authorised driver of the insured was agreed between the parties. In that case, the poser before the Court of Appeal was whether a woman, travelling as a passenger in a motorcar belonging to her husband, who was the insured in the relevant policy covering the said motorcar, which is driven by his son who is the authorised driver under the policy, can claim damages from the insurance company for the road accident after judgment had been entered against her husband and son. It was held that the insurance company was liable to satisfy the judgment entered against her husband and son. But the determination on the issue was over agreed facts, that the son, Chan Tak Boon @ Ching Tak Boon, was driving with the permission of the policy holder. In other words, Chan Tak Boon @ Ching Tak Boon was an authorised driver at the material time of the accident. But this is not the situation in our case. In our case it was never established or agreed between the parties that Lum Weng Hong was the authorised driver of the insured. Thus, whether Lum Weng Hong was the authorised driver of the insured remain a disputed fact which need to be determined at a trial.

[16] In conclusion, we hold the view that this is not a fit and proper case for an O 14 judgment to be granted as the defendant had shown that it has

fairly arguable defence to the claim. There are triable issues to be tried entitling the defendant to a full trial.

[17] For the reasons above stated, we unanimously allowed the appeal with costs, here and court below. The order of the learned High Court judge was therefore set-aside. A full trial was ordered to be conducted by the High Court. We also directed the deposit paid be refunded to the defendant.

Appeal allowed with costs.

Reported by Andrew Christopher Simon